Dec 1 - 1-2 3 7 Judge Davis
Argued
Argued - Judge Clifford
Affirm - Sec 727. 728. 729
Revised Statutes
Dist of Columbia
16. Stat Large
45

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 271.

SARAH McMURRAY, ISAAC S. HOLLIDGE, TRUSTEE, AND WILLIAM H. HOLLIDGE, APPELLANTS,

vs.

AUSTIN P. BROWN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 17, 1873.

The only point, is as to authority of married women to dedicate their Estate as a home &c

Affirmed
Judge Clifford Davis

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1 *Bill of complaint.—Filed April* 17, 1872.

In the supreme court of the District of Columbia, the 17th day of April, 1872.

AUSTIN P. BROWN
vs.
SARAH MCMURRAY, ISAAC S. HOLLIDGE, TRUSTEE, and William H. Hollidge.

No. 2742. Equity docket 11.

To the supreme court of the District of Columbia, holding an equity court for said District;

The plaintiff complains as follows:

1. The plaintiff is a citizen and resident of the city of Washington, in the District of Columbia, and brings this suit in his own right.

2. The defendants are also residents of said city and District.

3. At divers times in the months of June and July, 1870, the plaintiff delivered in front of the premises known as No. O street, north-
2 west, in said city and District, lumber and brick, to be used in the construction of two or more dwelling-houses then building upon said premises, worth at the ruling market-prices at that time, the sum of $1,230 $\frac{62}{100}$. Said houses were on lots 36 and 37, in square 511, according to the ground plan of said city, and both said lots and said houses were owned by the defendant Sarah McMurray. Said materials were used in the construction of said houses, which are not yet completed.

4. The defendant, Sarah McMurray, was represented throughout the transactions in this bill set forth by her husband, Robert A. McMurray, who, as plaintiff is informed and believes, acts as the agent of the defendant, McMurray, in all her business transactions, and who the plaintiff knows as her agent, superintended the construction of the buildings in the preceding paragraph mentioned, and was by the defendant, McMurray, recognized as her agent in and about the said matter.

3 5. Said materials were furnished upon a verbal agreement between the plaintiff and said Robt. A. McMurray, agent as aforesaid. Said agent agreed that, upon the delivery of said materials, the defendant would convey to the plaintiff a certain lot on K street, being lot No. , in square , which lot was owned by the said defendant, McMurray, or her said husband. The plaintiff agreed with said agent to take said last-mentioned lot in payment for said materials at the rate of 45 cents per foot. Said lot contained square feet of ground. For the excess the plaintiff was to deliver additional materials when called for. The materials delivered as aforesaid were furnished by plaintiff solely upon the faith of the agreement between himself and Rob. A. McMurray, agent as aforesaid, and with the distinct understanding that he was to look to the defendant, Sarah McMurray, for pay for said materials.

4 6. After the plaintiff had fully complied with said agreement on his part by delivering said materials to the satisfaction of the defendant, McMurray, the said defendant, refused to convey said lot on K street to the plaintiff at the rate of 45 cents per foot, and tried to persuade the plaintiff to take it at the rate of 65 cents per foot, which he declined to do. Afterwards, said Robt. A. McMurray, agent as aforesaid, desired the plaintiff to take cash in payment, and the plaintiff agreed so to do, but no part of the sum due the plaintiff as aforesaid has been paid.

7. On the 13th day of Feb'y, 1872, the plaintiff filed in the office of

the clerk of this honorable court written notice of his intention to hold a lien upon said lots 36 and 37, in square 511, and the improvements thereon, to which written notice was attached a bill of particulars of his claim. Said notice and bill of particulars are referred to and
5 made part hereof. At the date of filing said lien there was upon said real estate a prior lien created by a deed of trust given by the defendant, McMurray, and her said husband, to the defendant, Isaac S. Hollidge, as trustee, to secure the payment of a note for $1,625, payable to the order of the defendant, Wm. H. Hollidge. Said deed of trust is duly recorded in liber 639, folio 19, &c., of the land-records of the Dist. of Columbia, and is made part hereof. The plaintiff is informed and believes that a part if not the whole of said note has been paid, and prays discovery of the defendants in relation thereto. He further prays—

1. That said lots 36 and 37, in square 511, with the improvements thereon, or so much thereof as may be necessary, may be sold under the direction of the court, and that from the proceeds thereof the plaintiff's claim be paid.

6 2. That the writ of subpœna issue out of this honorable court against the defendants, Sarah McMurray, Isaac S. Hollidge, and William H. Hollidge, commanding them and each of them to answer the premises and abide by and perform such order and decree as may be passed herein, and for such other and further relief as the nature of the case may require.

AUSTIN P. BROWN.

E. L. STANTON,
A. S. WORTHINGTON,
Plff's Solicitors.

I, Austin P. Brown, on oath, say that I have read the foregoing bill by me subscribed; that the same is true wherein it states facts upon personal knowledge; and that wherein it states facts upon information from others, I believe it to be true.

AUSTIN P. BROWN.

Sworn and subscribed to before me this 17th day of April, 1872.
[SEAL.] EDM. F. BROWN,
Notary Public.

7 *Summons to answer.—Issued April 17th*, 1872.

In the supreme court of the District of Columbia, April 17th, 1872.

AUSTIN P. BROWN, COMPLAINANT,
against
SARAH MCMURRAY ET AL., DEFENDANT. } No. 2742. Equity docket 11.

The President of the United States to Sarah McMurray, Isaac S. Hollidge, trustee, and Wm. H. Hollidge, defendants:

You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bills under pain of attachment, and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief-justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise, the bill may be taken for confessed.

Marshal's return.

Summoned all. April 17th, 1872.

A. SHARP, *Marshal.*

8 *Stipulation in lieu of last answer.*

In the supreme court of the District of Columbia, the day of , 1873.

AUSTIN P. BROWN *vs.* SARAH MCMURRAY ET AL. } No. 2742. Equity dock. 11.

Stipulation.

The answer of the defendant Sarah McMurray to the bill of complaint in this cause having been lost or mislaid, it is stipulated and agreed that the answer of said defendant admitted all the averments of the first, second, fourth, and seventh paragraphs of said bill to be true, and denied each and every other material allegation contained in said bill.

A. S. WORTHINGTON,
Solicitor for Plaintiff.
WALTER S. COX,
JAS. S. EDWARDS,
Solicitors for Def't Sarah McMurray.

9 *Replication.—Filed May 29, 1872.*

In the supreme court of the District of Columbia, the 29th day of May, 1872.

BROWN *vs.* MCMURRAY. } No. 2742. Eq. dock. 11.

The complainant hereby joins issue with the defendant, and will hear the cause upon bill, answer, and proofs.

A. S. WORTHINGTON,
For Complt.

10 TESTIMONY FOR THE COMPLAINANT.

Austin P. Brown.

I am the plaintiff in this cause. I am acquainted with the husband of the defendant. About June, 1871, I made arrangements with Mr. C. W. Perkins to furnish materials for a block of houses to be built by Robert A. McMurray, for which he (Perkins) was to pay me, by giving me a deed of a lot of ground on K street, the deed to be given before the material was to be delivered. After this arrangement was made he sent

Mr. McMurray to my office, and he stated to me that the deed of the ground stood in his name, or, in other words, that he controlled the title, and that he would cause the ground to be deeded to me direct. On the strength of his promise I went on and delivered the materials at the block of houses aforesaid. After the materials had been delivered I demanded of McMurray a deed of the property, when he informed me that he had made an arrangement, provided I would agree to it, to sell the lot he had agreed to convey to me, and asked me if I would take cash in lieu of the lot for the amount of my bill, which I agreed to do. He came in a few days afterwards, and said that the sale of the lot had fallen through, but that he would raise the money on the lot and pay me cash for my materials, to which I agreed. I never have received any of the cash as promised, although I have asked him several times for it. I required a conveyance of the lot to me by McMurray at the time of my arrangement with him, because I was not satisfied with Perkins's responsibility. I delivered the materials before I got the deed because of my reliances on the promises of McMurray. I charged these materials as they were delivered to Robert A. McMurray. My book-keeper was A. B. Wolfe. I have from the time I furnished the materials looked to Robert A. McMurray, agent of Sarah A. McMurray, for payment for the materials. I have never looked to anybody else for the payment therefor. I know the materials were all sent, and saw some of them, both brick and lumber, delivered in front of the block of houses on O street, the same houses mentioned in the bill. I cannot say that I saw what became of the materials. I can only state that the materials were
11 being carried into the house when I was there on several occasions.

I gave orders to Mr. George H. Plant for the brick furnished, and to J. J. Hopkins & Brother; also to Windsor & Ford. The lumber was delivered from my wharf, and the order therefor was given to my clerk, Mr. Thomas Power, who is now in the city. The materials were delivered to Mr. C. W. Perkins, and some to Mr. Joseph Collins, the bricklayer, and to a Mr. Smith also.

Cross-examination:

Mr. Perkins came into the office and said that he was building some houses for McMurray on O street. That McMurray was to pay him partly in a lot on K street, between 17th and 18th streets, provided he, Perkins, could trade it for materials. I told him that I would take the lot if McMurray would agree to deed it to me as soon as the materials were delivered. He said that McMurray would do so, and that he, Perkins, would send him to the office the next day. He told me at that time that McMurray would convey the lot to me. Mr. McMurray did come in the next day, and agreed to deed me the lot, and to take in payment materials, which I was to deliver to Perkins. In the first place, McMurray asked me what price I agreed to give for the lot. I told him 45 cents a foot. He said that was satisfactory, and that he would have the lot deeded directly to me. I believe that was all that passed that time. The conversation did not begin by McMurray's asking if I was not trading with Perkins for material, but began by his asking what price I was to pay for the lot. He told me he controlled the lot. I did not say to him that Perkins had offered to trade a lot to me which he said he owned. Perkins told me the whole history of his transaction with McMurray. That conversation was not several weeks after the materials had begun to be delivered. It was, I think, the day after the materials began to be delivered; and if McMurray had not guaranteed to deed me the lot I would have stopped the delivery of the materials

Mr. McMurray did tell me, after the materials had been furnished which are charged in the bill, that he would not have the lot conveyed until Perkins put security on his bond. I immediately stopped the delivery of the material, and told McMurray that I would enter a lien upon the buildings, which McMurray advised me to do. Nothing was said
12 about security at all when he promised to pay money instead of conveying the lot; it was unconditional. I think that was in the presence of my father and another gentleman who was with McMurray at the time. I do not know who it was. I do not recollect of showing McMurray a bill against Perkins, and telling him that if I could not get the money out of Perkins I would try to get it out of him. I might have said so. I was directed by McMurray to deliver the goods to Perkins, when he, McMurray, agreed to convey me the lot, and it is possible that a bill may have been made by my book-keeper against Perkins. I do not recollect whether such a bill as you ask about was shown by me to McMurray. I mean, when I say that McMurray directed me to deliver the materials to Perkins, that he agreed to convey the lot as soon as the materials were delivered; and when he told me that he would not deed the lot until Perkins put his security on the bond I immediately stopped the delivery of the materials, and the next thing I did was to go into a suit against McMurray's wife. I think it was before the materials were all delivered that he promised to pay cash instead of conveying the lot. That was before he spoke of exacting security from Perkins. The amount of cash he was to pay was the amount of the bill for materials delivered to Perkins. All of the materials had not been delivered then. He was to pay cash for all the materials that had been delivered in this particular transaction. I do not think that Perkins and he and I had an interview together once at my door. I did not promise McMurray that I would see that Perkins would give security. I might as well have gone on the bond myself as to do that. McMurray told me that he expected to make a sale; this was at the time he agreed to pay me in cash. It was not at this time that he spoke of Perkins getting security on his bond. McMurray did not say at this time that he would give Perkins a day or two to get security, and if he did not, that he, McMurray, would sell the lot; at least I do not recollect distinctly about this. In case he did sell the lot, I was to be paid in cash; otherwise, I was to have the lot. He came in for the purpose of having me release the lot. I did not want to do so, but would do so to accommodate him, providing he would pay me cash for my bill.

Redirect:

I think I only talked once with Perkins about this lot before I saw
13 McMurray. I heard first from Perkins that McMurray would convey the lot to me. He said that McMurray instructed him to trade the lot for material, or, that this was the understanding between him and McMurray, that in case the lot could be traded for materials he was to take it in part payment, and I told him that in case McMurray would agree to deed me the lot, I would furnish materials to the value of it. This was the day after I gave Perkins the order for the materials; but if McMurray had not called and agreed to deed me the lot, as Perkins said he would, I would not have delivered the materials. I don't think I saw Perkins again before I saw McMurray. I do not know of ever presenting a bill to Perkins. I did not consider him worth anything, and this had all to do with my agreement to furnish the materials; for if McMurray had not agreed to deed me the lot, I would not have furnished any materials. I was aware at the time of this transaction that the law authorized the material-man to notify the owner that he held

him responsible for the materials furnished the contractor, and I had often done so before. I did not do so in this case, because I considered that I was dealing with McMurray, and not Perkins.

(Objected to by Mr. Cox.)

George H. Plant.

A gentleman by the name of McMurray came to my office to see about a bill of bricks. I know Perkins. I furnished him with bricks, to go into houses on O street, belonging to Mrs. McMurray, in the summer of 1871, I think. The books will show. I don't recollect the precise date. They were furnished under a contract with Mr. Perkins. I have not been paid for the bricks furnished. I do not proceed against Perkins to recover the amount due, because I do not consider him responsible. McMurray, about nine or ten months ago, called at my office to see about a bill of bricks that was furnished to the above-named buildings under the contract with Perkins. Mr. Myers then showed him the amount of the bills. McMurray asked if some ornamental and press brick had not been furnished there. He was told that Mr. Collins had ordered some few, which went to those same buildings. McMurray said then that Perkins was dilatory about completing the houses, and he was going to take charge and do it himself, and pay all claims against the houses himself.

14 *John W. P. Myers.*

I am clerk to George H. Plant; I have been with him nearly six years. I know of the houses built by Perkins, contractor, for Mrs. McMurray, I think; so Mr. Perkins told me. They are situated on O street between Fourth and Fifth. There were two of them. Mr. McMurray was not building any other houses on that street that I know of. Mr. Plant furnished brick to go into those houses to about the value of $250. He furnished the brick to that amount in value upon the order of Perkins, and looked to Perkins at that time for his pay. About a year ago, I think, a gentleman by the name of McMurray called at Mr. Plant's office. He requested Mr. Plant to give him the amount of indebtedness for brick furnished Perkins for those two buildings on O street, between Fourth and Fifth streets, being built for Mrs. McMurray, McMurray stating at the time that he would have to complete the buildings, as Perkins seemed to be dilatory in completing them. That he would settle with Mr. Plant and pay the bill, as he would have to complete the buildings. He would settle the bills, including Mr. Plant's as well as others.

(Objected to by Mr. Cox.)

Cross-examination:

When this gentleman came for the statement all of the bricks had been furnished by Mr. Plant. Nothing was stated in regard to other bills, other than as I have stated. The bricks were delivered in the fall of 1871; a month or two, probably more, had elapsed from the time the bricks were furnished until the conversation took place.

Redirect:

I think it was in the fall, probably before that, when the bricks were furnished; it may have been in July and August. I think what we furnished were sent there prior to September. (Witness is here shown Exhibit A. P. B. No. 3.) The handwriting of this is mine. The materials mentioned therein went to the place designated in the bill. 47,000 brick went to Mrs. McMurray's, on O street, between Fourth and Fifth

streets. I saw the brick leave the yard to go there. Mr. A. P. Brown ordered them to go there.

15 Recross:

I did not see them delivered on the ground. I do not think that, independently of this bill, I could state exactly how many bricks were sent to McMurray's.

(Counsel for defendants notes an objection to the above testimony as not being the best evidence.)

Alceus B. Wolfe.

I am a book-keeper by occupation. I have been with Mr. Brown since the year 1867. The book I have with me is the book in which I make the original entries of charges for goods delivered to parties. The book is kept in this way: We send orders to the wharf or to other parties to deliver materials, and when I get the return of the amounts delivered, I charge it on this book to the parties, making out a bill and taking a press copy of that, which is my original entry. We keep the original bills until we need them to deliver them to the parties. The entry on page 132 is charged for goods delivered from the wharf as far as lumber is concerned. I knew what was delivered from the wharf from the returns made to me from the wharf. I could not say what was done with the returns made from the wharf until I made a search at my office. I generally stick these memorandum returns in my desk. I have not made a search for these returns. I made up the entries as to the brick from the bills of Windsor & Ford, G. W. & J. O. Hopkins, and George H. Plant. (Bills put in evidence marked Exhibits A. P. B. Nos. 1, 2, and 3; F. P. B. O. Ex'n; copy of bill entry from page 132, referred to, offered in evidence in place of book by consent of parties, marked Exhibit A. P. B. No. 4; F. P. B. O. Ex'n. in chief, subject to same objection as book. The counsel for defendant objects to the bills as hearsay, and objects to the book because the entries are made by the clerk from the reports of other persons.) I do not keep myself any other record of goods delivered than that contained in this book. This entry was made at or about the date thereof, in the ordinary and usual course of business. I know that Mr. McMurray came into the office several times, and hurried up the materials to be sent to the buildings.

16 Cross-examined:

This book represents the charges for actual delivery. The date, December 4, 1871, indicates the amount delivered up to that date. I do not always make up the bill until I need it. I keep a cash-book. I don't keep a day-book. I keep a memorandum, and charge it up on this book. There is no charge for these materials on any other book than this that I know of. That is the only entry of those goods on this book. That is the first charge of any goods on any book against Mr. McMurray that I am aware of. The form of the memoranda from which this bill is made up is as follows: The clerk at the wharf sends me a memorandum, giving date, name, and amount of material delivered; the name of the person I give him. Mr. McMurray came to the office during the time the buildings were going up. I gave orders to the wharf to deliver these materials by order of Mr. Brown. The name I give to the wharfinger is not always the name of the builder. I may have often written, "Send to McMurray's house." I have no regular way of making out the orders, except to make it intelligible to the driver. I sometimes order

the goods sent to the house, to the foreman or otherwise. I can't say how the tickets in this case were made out without seeing them. I charged these goods, ordered to Mr. McMurray by Mr. Brown's orders. (Exhibit A. P. B. No. 6 offered in evidence by Mr. Cox, and filed and marked.)

Redirect:

These bills already in evidence were paid by Mr. A. P. Brown. They were made out just at the time the firm was dissolved, and in that way they were charged to S. P. Brown & Son.

Charles W. Perkins.

I am a builder by occupation. In the spring and summer of 1871 I was engaged in building houses for Sarah McMurray, on O street, in this city. All the work was done through Mr. Robert A. McMurray. I do not remember exactly the number of the lots on which the buildings were put up, but I think they were on lots 36 and 37, in square 511. They were on O street, between 4th and 5th streets. There were two of them. I was the con-
17 tractor. I did not complete them. I completed the brick-work. I had the back buildings under roof; that is, all except the tin. The frame of the French roof was on the front building. I quit work on toward the latter part of the summer. The houses were completed this spring. He had men at work on them all last winter. I saw them at work on them in the spring. They were trimming out the houses early in the spring. I could not give you exactly the day or date. I do not know that materials were delivered there by A. P. Brown. They were all the brick used in the buildings, and there were four or five thousand brick left, which Mr. McMurray took and built walls with in the rear of the lots. Joseph Collins did the brick-work for him as my subcontractor. Mr. McMurray employed him after I stopped. Every brick used in the houses, I think, was furnished by Mr. Brown, except the press brick for the front. Mr. Brown was to furnish me with 100,000 brick there. He furnished me with that number, except the last 20,000, some few thousand of which were not sent. He furnished about all the lumber that was furnished to the house, from the cellar to the garret—the joists, cullings, studding, and window-frames—the rough lumber. I am familiar with the prices of lumber at that time. I have looked over the bill, item by item, (Exhibit A. P. B. No. 4,) and I say that the items as charged therein are, according to the market rates at that time, *are* correct. I remember the materials that went into the buildings. All the materials mentioned in this bill went into the buildings. I was there every day. When I was away a workman, Charles Smith, carpenter, received all the lumber and brick; tickets were given for the same. I sold Mr. Brown a lot on the south side of K street, between 17th and 18th streets, for $1.45 per foot.

Question. Did you ever own that lot?

Answer. I thought I did. I was to have this lot for the first payment on these houses. In the first place, Mr. McMurray wanted me to take a house in Williamsport, Pennsylvania. I told him I was a little embarrassed, and I was unable at that time to hold a house. He told me that I could trade it for lumber and materials. He brought me the price-list of the Williamsport market, and I thought I could make something by going up there. I went there with Mr. McMurray. We were unable to sell it. Mr. Deitrick, a lawyer there, offered Mr. McMurray this lot on K street, which we speak of, and the balance of the money on the house in notes. McMurray would not trade with

18 him unless I would agree to take the house at $1\frac{40}{100}$ per foot. I told him I would let him know after I got home. I would then see if I could trade the lot. The day after I returned I drove to the corner of 15th and New York avenue, and there met Mr. Richards. I offered to sell him the house at $1\frac{50}{100}$ per foot, and take 100,000 brick, the balance in lumber or money. He had not the brick to spare. Mr. Austin Brown came along; he said he would take the lot at $1\frac{45}{100}$ per foot, would give me 100,000 brick at cash price, balance in lumber. I went back and told Mr. McMurray that I would take the lot. I told him to write to Mr. Deitrick immediately. I told him to have the deed made directly to Mr. Austin Brown, as by that reason it would save making one deed. I told him I would give him half of what I got over $1\frac{40}{100}$ after I had made the sale. He thought I had done very well in selling the lot. Mr. Brown commenced delivering the stuff to my recollection. Now there was no delay on Mr. Brown's part. About the time the materials were all delivered, I asked Mr. McMurray if he had deeded that lot to Mr. Brown. He says no, I am offered $1\frac{60}{100}$ for it. I am going to pay him cash. I said to him, Mc., you can't do any such thing as that. I told him that Mr. Brown had bought the lot and had sold it again. He said that he would pay Brown for the material delivered. He told Mr. Brown in my presence that he would pay him the money in lieu of the lot. I sold the lot in good faith to Mr. Brown, and he commenced furnishing material. I expected that it would be conveyed to him just as soon as we could hear from Mr. Deitrick at Williamsport. Mr. McMurray agreed, before any of the goods were delivered, to convey the property directly to Mr. Brown; he agreed so to do within two hours after I made the agreement with Mr. Brown. Mr. McMurray and I met Mr. Brown near his office, and McMurray then agreed to deed the lot to Mr. Brown; this was after the materials were commenced to be delivered. McMurray told me that he had seen Mr. Brown before we saw him together. He told me what passed between them. He said he had told Mr. Brown something, such as that it would be all right soon as he could get returns from Williamsport. McMurray offered to pay Brown cash instead of the lot after the materials were furnished. As well as I can remember Mr. Brown said he had sold the lot; that he depended on it, and would rather have the lot. I cannot say whether or
19 not he finally agreed to take cash. I did not hear him refuse to take it. Mr. McMurray has not paid me one cent on these houses. It was not 45 cents per foot that I was to take for the lot from Mr. Brown; it was a dollar forty-five. I beg your pardon; upon reflection it was 40, 45, and 60 cents; and not $1.40, $1.45, and $1.60 that was to be given.

Cross examined:

I was working on two houses for Mrs. McMurray; my first contract I have in writing, if you wish to see it. I was to build the houses for so much money. (Objected to, because contract itself is the best evidence.) I don't recollect the time within which the contract was to be completed; the contract will tell you. I don't remember how I was to be paid; the contract will tell you. This paper you now show me (filed and marked Exhibit A. P. B. No. 5,) is a true copy of the first contract. (Introduction of this contract objected to as being immaterial.) I did not commence work until we had a different understanding from that in the contract. I did not commence the excavation before the change was made in the contract. After that contract was signed, I told Mr. McMurray I was a little unfortunate in business, and he seemed willing to

help me, and we made this bargain: I should take one lot, the one this way of the two houses on O street, and this lot from Dietrick, of Williamsport, Pennsylvania, at forty cents, and that should be all the cash payment that was to be made. I traded the lot on K street with Mr. Brown. I do not know how soon after the date of the contract it was that the change was made. I could not tell when it was that I was in Williamsport; I could not say that it was on the 8th of June. I told Mr. McMurray, in Deitrick's office, that I would not take the lot unless I could trade it. I did trade it to Brown, and told Mr. McMurray to have Deitrick convey to Brown, and he said that he would do it. He told Mr. Brown that he would do it in my presence. There was no change whatever in my part of the stipulations in the contract. I am pretty positive that I did not commence the excavation until the change was made in the contract. The lot on O street I am positive I was to give sixty cents a foot for; I believe this to be so. Mr. McMurray told me that there was a small mortgage on the two lots, and he says, "Perkins, when you have the brick-work commenced, I will have the mortgage taken off of yours and put it all on my lot, so that you will be enabled to sell or raise money on your lot." I could not tell you the number of feet in the Deitrick lot; it is quite a deep lot.

Ques. Your contract providing in the first instance that you were to be paid the first installment only when the houses should be completed, what inducement did you offer the defendant, or her agent, to agree to make you a cash payment to the value or in the shape of the Deitrick lot before any work was done or materials furnished?

(Objected to because all transactions between Perkins and the defendant, or her agent, to which the complainant was not a party, are immaterial in this case.)

Ans. I did not ever offer any.

Ques. Was not Mr. McMurray's offer, then, a mere accommodation, volunteered for your assistance?

Ans. He told me it would be an accommodation to him, and I told him it would be an accommodation to me likewise. He said he would be enabled to dispose of his Williamsport property, which was not paying him much.

Ques. Your written contract was prepared to be executed with sureties; why was it not so executed?

Ans. I told Mr. McMurray, in the presence of witnesses, that if he would give Mr. Brown a deed of that lot, according to agreement——

Ques. Your written contract was prepared to be executed with sureties; why was it not so executed?

Ans. I signed that contract in his own house, late one evening. We then changed the contract after I had signed it in the manner mentioned. Then I told Mr. McMurray, in presence of witnesses, that I would give him all the security that he wanted if he would give Mr. Brown a deed of the K street lot, according to agreement, and give me security that the deed of trust should be released off of the O street lot when the houses were completed He refused to do it, and I refused to give any security.

Ques. Did not Mr. McMurray make it a condition of his offer to convey the Dietrick lot that you should give security for the performance of your contract?

Ans. No, sir, he did not.

Ques. Did he not, in the presence of H. H. Bishop, tell you that you could not trade that lot for materials without giving security?

(Objected to on the grounds stated in the last preceding objection.)

Ans. He did not, sir.

21 Ques. Why, then, did you say anything to him about giving security?

Ans. The O street lot I was to have for 60 cents, I think, and on it I was to build my own house. He told me that there was a small deed of trust on the two lots. He says, as soon as you commence the brick-work I will lift the deed of trust off of yours and put it all on mine. I told him that would enable me to sell mine or borrow. About the time the brick-work was done, I made an arrangement with Havener & Sherman to borrow $2,000.00. I went to Mr. McMurray and asked him to take the deed of trust off of that house, so that I could borrow some money thereon. He said that Mr. Hollidge had gone back on him, and would not release until both houses were done. I went to Mr. Hollidge. He stated to me that Mr. McMurray had only paid $125.00 on both lots, and he had rather have a deed of trust on both than on one, and he should not release it. [Objected to.]

Ques. What security did you ever offer to Mr. McMurray?

Ans. I offered him satisfactory security. I do not recollect of any specific security that I offered.

Ques. When did you contract with Mr. Brown for materials?

Ans. The next day after I came from Williamsport; but I can't say the day and date.

Ques. Did you inform Mr. McMurray that you had contracted with Mr. Brown?

Ans. I did, sir, the very day; and that I had agreed to convey to him the Dietrick lot.

Ques. Had any of the materials been then delivered?

Ans. They were delivered the next day. I had spoken to Mr. McMurray within a few hours of making the agreement with Mr. Brown, and he said he was very well pleased, and I then went right straight to Mr. Brown's office and told him of this, and he said he would give me an order at once on Hopkins to give me so many thousand brick.

Ques. Did he give you that order at once?

Ans. He did, sir, and sent the brick up, commencing to deliver them the next morning; I think the first order was 20,000 brick.

Ques. How soon did you get the lumber from Mr. Brown?

Ans. Right along as I wanted it. I think all the orders that were given were to furnish me with so many brick or so much lumber on O street, between 4th and 5th streets. I believe that after Mr.

22 Brown furnished what he furnished, a man named Smith furnished about 10,000 brick. The last order from Mr. Brown on Windsor & Ford, I was told by Windsor & Ford that they could not supply, as they had not the number, and I ordered them from Mr. Smith, and part of them were laying there when I quit work. Windsor & Ford, however, opened two new kilns, and sent the bricks up, so that both 10,000 came up. The tickets were sent for everything, which were signed by me or Smith. The way I kept the tally was, I was to have the 20,000 brick; I would give out brick-tickets enough for the amount to fill the order, and when they were all given up I had my amount of brick. I did not lay any flooring in the houses; they had not progressed that far. A man named Heimer furnished some pressed brick. I don't exactly know when I quit work on the houses. It was because McMurray did not do as he agreed, and would not convey me the lots or the money; and I was not able to complete the two houses without receiving some money or its equivalent.

(Objected to.)

Ques. Could you have built the one house intended for Mrs. McMurray without such arrangement as you say Mr. McMurray made?

Ans. I could have built one house if he had of given me the lot my house was on, for I would have been able to borrow money thereon.

Ques. If you had not partly built the house intended for yourself, could you not have built Mrs. McMurray's house without a deed of conveyance of the Deitrick lot or the other lot?

(Objected to.)

Ans. I might, but was not disposed to do it. I did not raise any money on property of my own. I did state so to Mr. Collins and others, but I referred to the $2,000 I was to get from Havener & Sherman. (This answer objected to.) This money was to be obtained on the house on O street, and not the house I was living in.

Ques. Did you not say, in the presence of Collins and others, that you had sold the house you were living in to Havener, and that you expected to have money in a few weeks?

(Objected to.)

Ans. I told Mr. Collins I sold the house to Mr. Havener; but before the first payment was made he came to me and told me that he had bought a house elsewhere, and changed his mind.

Ques. What more was necessary to enable you to complete the houses?

(Objected to.)

23 Ans. I had all the bricks necessary there, and almost all the lumber necessary. I had more than enough lumber to complete the McMurray house. The brick-work was all done, and the back building was sheathed, and nothing was wanting but the slating and plastering and general finishing up. There was considerable bricks and lumber remaining. I am not prepared to say just how much it would take to complete the house.

Ques. Couldn't you have completed the house without any assistance?

(Objected to.)

Ans. I could not do it. I could not as I was then circumstanced. I could have done so had he come up to his agreement. Mr. Shelly, a man in my employ, told me how much lumber, &c., remained when I quit work. I think it was he—I won't be positive. It was one of the men. Mr. McMurray never offered to give me a deed of the lot on O street if I would give him security. On the contrary, I offered the security if he would give me the lot.

Ques. Did not you refuse to give the security unless Mr. McMurray would first convey the Deitrick lot to Brown and the O-street lot to you?

(Objected to as wholly irrelevant.)

Ans. I agreed to give security when he would give Mr. Brown a deed of the lot according to agreement, and give me security that, when the houses were done, that the deed of trust should be released from the O-street houses.

Ques. Did you offer Mr. Hewitt or Mr. Hoyle as securities?

(Objected to.)

Ans. I did, sir. I offered them after the contract was signed.

Re-direct:

I was present when Mr. McMurray agreed to convey this property directly to Brown. I don't recollect that Mr. Brown ever said that he would not furnish the materials until this agreement was made. A small portion of the materials might have been furnished before Mr.

McMurray went to Brown's office with me. I can't say that any materials were furnished before the agreement was made, but there might have been a few; very few, if any. There was nothing said in my presence about bonds with Mr. McMurray, Mr. Brown, and myself. Mr. McMurray told Mr. Brown that as soon as the materials were furnished he would deed the property to him. There was no condition at all, and I went away satisfied. Mr. McMurray never said anything about bonds in my presence to Brown at the time he told Brown that he would pay cash. He said that he had an offer of 60 cents for the lot, and would like to take it and pay cash for the materials furnished. Mr. Brown said he had depended on his conveying the lot, and had sold it; but that if he could not get the lot he would take money. I don't recollect any condition to his promise to pay cash. It is the custom to have brick, when ordered in such cases, sent to the contractor, and not to the owner. It is not an unusual thing for the material-man, even when his contract is with the owner of the building, to deliver his material to the contractor at the building; it is very often done. The most of my brick-tickets I put my name on, and those used in this case were not used over again. They were pasteboard tickets.

(Witness is shown Exhibit A. P. B. No. 4.)

This amount of brick shown in the bill was furnished by Mr. Brown. I think there were 10,000 furnished by him that are not in the bill. (Objected to.) The 10,000 furnished by Mr. Smith are not included in the bill. These are the only houses on O street between 4th and 5th that I was building for Mr. McMurray at that time. Mrs. McMurray's house was larger than mine. I did not hear any time named within which the lot was to be conveyed; it was to be done right away. I so understood from Mr. McMurray. On informing him of my agreement with Mr. Brown, he said he would write on at once to Deitrick, and I told him that he should have the deed made direct to Mr. Brown, so as to save the expense of two deeds. I saw Brown the same day that McMurray told me this. I reported to him that McMurray would have the deed made out as quick as he could hear from Williamsport. No materials were then delivered, but I went on right after that to deliver them. Mr. Brown has not presented his bill to me for these materials at all. I never saw his bill until I saw it here. Mr. Brown has not in any way or shape shown that he looked to me for payment. (Objected to by Mr. Cox.) I have not offered to pay him. I have bought other materials and paid him for them. (Objected to.) He did not ask me for pay; he was to take the lot from McMurray in lieu of the pay; and Mr. McMurray afterwards said he was to pay Brown in cash instead of conveying the lot. I am unable to say now exactly what the labor and materials were worth that were put into the houses. It was somewhere in the neighborhood of three thousand dollars. It might have been less, but not much less. The main cause of my leaving off work was, that there was a deed of trust on the lot, and he would not convey the lot to Brown that I promised to take in cash payment, and I had not received any money, and I had not anything to secure me to show that I would get any without I took a lien on the houses. I told McMurray if he would give Mr. Brown the lot according to agreement, and give me security that the deed of trust should be lifted from my lot on O street when the house was completed then I would give him security that I would complete the houses in a certain time. He did not do so, and therefore I stopped the buildings. The houses were not built according to the written contract that has been filed here; they were altered by Mr. McMurray and myself after the agreement. I made no changes in the plan without his concurrence. It was the latter part

of August or 1st of September that I quit work. The houses could have been completed according to the contract between the time I quit and the 1st of November.

Re-cross:

I considered that after I agreed with Brown to convey the property to him, the lot on K street was his, to pay for materials, and McMurray did too. I told Brown how I came by the lot. I don't recollect that I told him it was my lot. Mr. Brown was to give me the full value of the lot in bricks. The day after I made the agreement (it might have been the same day) he gave me orders for the materials. I think it was the next day that McMurray saw Brown, and he said the same day that I saw him that he would write at once to Dietrick. I could not say that McMurray saw Brown before or after the order was given for bricks. I think I got the materials the next day after the order was given. I suppose I got the materials a day or two after I made the agreement with Mr. Brown. It may have been the next day. I commenced to get them just as soon as I could after the agreement. The order was given to me by Mr. Brown for materials.

Ques. Did not Mr. Murray inform you that he had an offer for the lot on K street, and that, if you did not furnish security within a limited time, he would have to sell it?

26 Ans. He never told me any such thing.

Ques. Did not that occur at Senator Morrill's house?

Ans. No, sir; he did not tell me that he had lost the sale of the lot by waiting for me. Mr. McMurray was at my house one day, but to my recollection he did not say that he would give me until the next day to furnish security. The alterations made in the houses were: the first story is now fourteen inches thick, where it was to be but nine; then one house, I think, is four feet longer, and the other six feet longer, than contracted for. Then there was a recess to be made in McMurray's house on the east side, and that was altered. There were some alterations in the general plan of the house, (which plan was made by Walter S. West, architect,) except in the front of the houses. There was a change in the cost of these houses because of the alterations. Mr. McMurray was to pay me whatever was right for making these changes. I claimed security from McMurray for the release of the lot I was to have before I quit work as soon as I saw Mr. Hollidge.

Joseph F. Collins.

I know Mr. Robert A. McMurray. I did brick-work for him in 1871 and 1872 upon two houses on O street, between 4th and 5th. We did not finish the houses until the spring of 1872. I did all the brick-work on these houses. My contract was with Charles Perkins. I do not look to Perkins now for payment, because Mr. McMurray assumed the debt and paid me part on account. I know that Mr. McMurray also assumed the lime-bill of Mr. Clabaugh for lime furnished in the construction of those houses. I heard him tell Mr. Clabaugh that he assumed the bill, and would see him paid. I have not filed any notice of lien for the balance due me. I have taken no action. I would have done so, but he kept promising me and putting me off from time to time so long that it was finally too late for me to do so. I suppose he did this on purpose, so as to cause me to lose my lien on the houses; that's what I think. As near as I can judge, about 110,000 brick went into those two houses. I made this measurement of the number of brick myself. I know that Mr. Brown furnished brick for these houses, but in what quantities I do not know. He bought the bricks from different parties, who would

27 send the bricks to the houses. He bought them from Plant, from Hopkins & Brother, and from Ford & Brother or Ford & Windsor, I don't know which; I think, however, it was Ford & Brother. I saw the wagons of those firms bringing there the brick ordered by Mr. Brown. I should estimate the cost of building those houses at least at $3,500.00 each—I mean the actual cost of the construction, without regard to the cost of the land or the builder's profit.

EXHIBIT A. P. B. No. 1

WASHINGTON, D. C., *Sept. 16th*, 1871.

Messrs. S. P. Brown & Son to Windsor & Ford, Dr.

1870.		
June 19th.	To order in for W. W. Burchel	$75 00
1871.		
July 12th.	To " C. W. Perkins, 10,000 merch. bricks	110 00
" 13.	" " C. W. Perkins, 20,00' " "	220 00
		$405 00
1871.	Cr.	
Aug. 16.	By note at 90 days	350 00
		$55 00
1871.		
Sept. 29.	By bill freight on engine	25
" "	By amt. charged Ford & Ford	$30 00

Received payment.

WINDSOR & FORD.

28 EXHIBIT A. P. B. No. 2.

Messrs. S. P. Brown & Son, bot. of G. W. & J. S. Hopkins.

1871.		
May 17.	10,333 M. bricks, $10, (90 ds.)	$103 33
June 26.	20,000 do (Perkins,) $11	220 00
		$323 33

July 13th, 1871. Rec'd note @ 60 ds.

G. W. & J. S. HOPKINS.

EXHIBIT A. P. B. No. 3.

WASHINGTON CITY, D. C.

Mess. S. P. Brown & Son to George H. Plant, Dr.

1870.		
October 8th.	To 14,000 arch brick, East Capitol street & 5 st., $12,00	$168 00
" "	To 4,000 salmon do. do. do. 11,00.	44 00
" "	" 1,000 red " " "	13 00
Nov. 29th.	" 333 red " " "	4 33
1871.		
Jany. 20.	" 666 red " " "	8 67
" 30.	" 333 red " " "	4 34
July 12.	" 8,000 red & sal., 6 & 4th sts., for Mr. Perkins, $1,100	88 00
"	" 20,000 merch. brick do. do.	220 00
" 26.	" 19,000 do. do. " "	209 00
		$759 34

29 EXHIBIT A. P. B. No. 4.

WASHINGTON, D. C., *Decr.* 4, 1871.

Mr. Robert A. McMurray to Austin P. Brown, Dr.

1871. Del'd on O street, bet. 4 & 5.

June 12.	400 ft. Va. pine-flooring, $4\frac{1}{2}$				18	
	1 pce. 3×4 20=20, $2\frac{1}{2}$					50
	88 ft. Va. pine-flooring, $4\frac{1}{2}$				3	96
	1,000 ft. $\frac{4}{4}$ wht. pine				65	
	1,000 " $\frac{6}{4}$ " "				65	
	1,000 " $\frac{4}{4}$ " "				60	
	1,000 " " " " rough				40	
27.	1,000 " 2×10, 16 to 22				25	
July 19.	47 pcs., 2×10, 22		733			
	10 " 2×10, 20		333			
	15 " 2×10, 18		450			
	10 " 2×10, 22		367			
26.	8 " 2×10, 16		213			
	7 " 2×10, 20		233			
28.	20 " 3×4, 16		320			
	6 " 2×10, 20		200			
	20 " 3×4, 16		320			
	10 " 3×4, 16		160			
	47 " 2×10, 16		470			
				3,799..$2\frac{3}{4}$	104	47
July 12.	10 M. brick, $11				110	
" 13.	20 " " H, 11				220	
" 12.	8 " " P, 11				88	
" "	20 " " P, 11				220	
" 26.	19 " " P, 11				209	
					$1,228	93

30 EXHIBIT A. P. B. No. 5

Articles of agreement made and concluded this sixth day of June, A. D. 1871, by and between Chas. W. Perkins, trading and doing business under the name, style, and firm of C. W. Perkins, contractor and builder, of the city of Washington, in the District of Columbia, party of the first part, and Sarah McMurray, of the same city and District, party of the second part, witnesseth: That the said C. W. Perkins, party of the first part, for the consideration hereinafter mentioned and set forth, does for himself, his and each of his heirs, executors, and administrators, covenant, promise, and agree, to and with the said McMurray, party of the second part, her executors, administrators, and assigns, in manner and form following, that is to say, that he, the said party of the first part, and his assigns, shall and will, on or before the first day of November, A. D. 1871, ensuing, in a good, skillful, and workman-like
31 manner, and according to the best of his knowledge, skill, and judgment, and to the satisfaction of the said McMurray, party of the second part, well and substantially erect, build, finish, and fully complete, on O street north, between 4th & 5th streets west, in the said city of Washington, one (1) two-story brick house or messuage, with French roof, according to the draft or plan and specifications hereunto annexed and made a part of this agreement. Said house being

designated on the annexed plan, and in the specifications aforesaid, as house No. 1. And he, the said party of the first part, does further covenant, promise, and agree to and with the party of the second part, to supply, furnish, and procure, at his own proper cost and expense, for the consideration hereinafter mentioned and set forth, all the stone, bricks, timber, mortar, cement, tin, slate, and other materials, and all the labor and skill necessary to the excavating, masonry, carpenters' work, plastering, slating, tinning, plumbing, cementing, gas-fitting, bell-
32 hanging, and all other work, labor, and material required and necessary in and to the construction, building, and completion of the said house, according to said annexed plans and specifications.

In consideration of the said party of the first part furnishing and supplying all the materials and the labor and skill necessary to the proper construction and completion of said house, and the full and faithful performance and completion of said work within the time aforesaid, according to said plans and specifications annexed, to the satisfaction of the said party of the second part as aforesaid, she, the said party of the second part, for herself, her executors, administrators, &c., doth hereby covenant, promise, and agree to and with the said party of the first part, and the survivor of him, his executors, administrators, and assigns, to well and truly pay unto the said party of the first part the sum of three thousand four hundred and fifty dollars, for the building and completion of house No. 1 according to said annexed plan or plat, to be paid by
33 the said party of the second part, in manner following, to wit, the sum of one thousand dollars and lot No. 37, in square 511. This amount is to be paid and lot 37 deeded to C. W. Perkins, party of the first part, when said house is constructed and finished in manner required by this contract, and the plans and specifications made a part thereof, and the balance of said money, viz, twelve hundred dollars, to wit, to be paid by notes of fifty dollars each, bearing date December 1st, 1871, payable monthly, and drawing interest at 8 per cent. per annum, to be secured by deed of trust on house and lot known on plat as house No. 1, and subject to a former deed of trust on same lot. And the said party of the first part, for himself and each of his heirs, executors, administrators, and assigns, hereby further covenant, promise, and agree to and with the said party of the second part, her executors and administrators, to supply and furnish all the materials at his own cost and expense,
34 and build and finish the said house within the time stipulated, according to the said draft or plans and specifications annexed, and to the satisfaction of the said party of the second part as aforesaid; and further, that he, the said party of the first part, will promptly pay and satisfy all claims, debts, or demands for materials furnished, or for work and labor done and performed on said house, and will secure, protect, and defend the said house and the said party of the second part against all mechanics' liens, or liens for materials furnished, or work done on said house, and from and against all claims and incumbrances whatsoever; and further, will secure, protect, defend, and leave harmless, the said party of the second part, her executors, administrators, or assigns, from and against any and all suit or suits, either at law or in equity, claim or claims, debts or demands whatsoever, by reason of any work done or materials furnished on said house, and will promptly deliver and
35 turn over to the said party of the second part, her heirs, executors, administrators, or assigns, the said house on or before the first day of November, 1871, ensuing, fully completed and finished, according to the said plans and specifications annexed, and to the satisfaction of the said party of the second part, free and clear of all mechanics' liens, or in-

cumbrances of any kind, and free and clear of all claims and demands of any kind, for work done or materials furnished said house.

To the true and faithful performance of the several articles, covenants, and agreements, hereinbefore mentioned on the part of the said party of the first part to be observed, done, and performed, he the said Chas. W. Perkins, party of the first part, and his sureties, hereby bind themselves and each of them, their and each of their heirs, executors and administrators, unto the said Sarah McMurray, party of the second part, her executors and administrators, in the penal sum of seven thou-
36 sand dollars current money. In witness whereof the said party of the first part, and sureties, and the said party of the second part, have hereunto set their hands and affixed their seals the day and year first hereinbefore written.

C. W. PERKINS. [SEAL.]
R. A. McMURRAY. [SEAL.]
SARAH McMURRAY. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. H. BISHOP.

EXHIBIT A. P. B. No. 6.

JUNE 30, 1871.

C. W. PERKINS:

400 ft. 4 × 4 Va. pine flooring, 4½	18 00
1 p'ce 3 × 4, 20 = 20, 2½	50
88 ft. 4 × 4 Va. pine flooring, 4½	3 96
1 M ft. 2-inch white pine 6½	65 00
1 " " 1½ " " " 6½	65 00
1 " " 1 " " " 6c	60 00
1 " " 1, rough " " 4c	40 00
1,000 ft. 3 × 10—16 to 22 ft., 2½	25 00
	277 46

True copy of entry on page 12 of the same book from which Exhibit A. P. B. No. 4 was copied.

37 TESTIMONY FOR THE DEFENDANT.

Robert A. McMurray.

I reside at No. 433 O street, in this city. I know all the parties to this suit. About six weeks after I had contracted with C. W. Perkins to build, and the work had been progressing for about that length of time, the brick-work was nearly up to the first floor before I found out who it was from that Mr. Perkins was getting brick and material. I had up to that time tried to find out from Mr. Perkins who he was trading with, but could not until about that date, when I complained that the joists were not such as I had contracted for; when he said it was the best Mr. Brown had, which was the first I knew as to the party from whom he got his material.

(This testimony objected to because the proper foundation has not been laid.)

So soon as I knew he was trading with Mr. Brown, I went to Mr. Brown's office and asked him if he was trading with Mr. Perkins for material for those O-street houses. He said that he was; that Mr.

Perkins had traded him a lot which he (Perkins) said he owned on K street. I told him that Mr. Perkins did not own the lot. He says, "The devil he doesn't; he told me that he did own it." I then told him that the lot belonged to my wife, but that if Perkins gave security on his bond, as the contract called for, it would be all right; but if not, it would not be all right. I further stated that we would not be responsible for any of Perkins' debts, unless we had the security called for in his contract. He says, "I will see that he gets that all right." I told him that if Perkins would obtain the security, that then I would, instead of deeding the lot to Perkins, deed it to him. I asked him what price he had agreed to let him have the lot for; he said forty-five cents per square foot. I told him that I had told Perkins that he could not trade it for less than fifty cents per foot, and then would have to give his security first.

(Objected to for want of proper foundation.)

I then went and notified Mr. Perkins that he could not trade the lot, unless he first put the sureties on the bond.

(Objection repeated.)

38 He said he would have them on the next day; that he would have Robert Hewitt and Henry Hoyle go on his bond. This he did not do. I then called to see these men, and they said they would not go his security for anything. Mr. Brown made out a bill to Mr. Perkins for this material—I don't remember the month—and sent for me to come to his office; showed me the bill, and said that he thought I ought to pay it. He further said that he was going to try to get it out of Mr. Perkins, but that if he failed there he would try to get it out of me. I then said to him that it was a matter between him and Mr. Perkins; that I had never bought any material from him, but that I had gone and notified him, (Brown,) so soon as I learned that Perkins was trading with him, that we would not hold ourselves responsible for any of his debts, unless the security was given. Dr. Grant wanted to buy the lot of me. I told him that I would call and see Mr. Brown, as I had promised that gentleman that if Perkins gave the required security he (Brown) should have the lot. I then and there, in Dr. Grant's presence, told Mr. Brown that we would not hold ourselves responsible for any of Perkins' debts, unless we did have securities on his bond. I told him that if I got cash for the lot, and he would see that the proper securities were given on the bond, we would then hold ourselves responsible, but not otherwise. Mr. Brown made up another bill afterwards with this material charged to R. A. McMurray. I notified him that I had never bought any material of him, and had nothing whatever to do with it. I never ordered any material from Mr. Brown. After Perkins abandoned his work—this was somewhere about the latter part of August, 1871—the houses had the brick-work mostly completed, and the back building of the house Perkins was building for himself was sheathed in, ready for tinning. No other portion of the houses were ready for roofing. The French-roof ribs on the main buildings were up. I notified Perkins sometime after this in writing that if he did not complete the houses by the 1st of November, 1871, I should take possession of the houses and put some one there to finish them, which I did do. Before he abandoned his job, I told him that if he could not complete the houses to throw them up at once. He said he could and would finish them under the written contract. Mr. Perkins never signed the original contract until somewhere in the middle of the month of July. The copy of the contract was

39 signed during the month of June. No change was ever made in

the terms of the contract after it was signed. There was no other agreement than that embodied in the contract. The lot on K street was worth, when we first traded for it, 50 cents per foot. This was about $1,690 in all. We afterwards sold it for 60 cents per square foot, about $2,035 in all for the lot. Mr. Perkins was to get in money and value, for building my house, about $3,600. The house adjoining mine was built for Mr. Perkins himself from the very commencement. I never had anything to do with that house until after we dispossessed him on the 1st November, when I took possession, and went on and completed the houses, commencing work that day. One house was not finished until June, 1872; the other not until July, 1872. The contract-price with the other party, to finish the houses, was $4,700; very little more than half of that sum was spent upon our house. The houses cost in the end some $2,000 more to build than Perkins contracted for in the first instance, besides the loss on account of the non-completion of the houses by Perkins by the time agreed upon.

NOTE.—Parts in brackets objected to.

Perkins never sent me to Brown to arrange about the lot on K street. He always tried to keep me from knowing with whom he was trading. Before I met Mr. Brown at all, the brick-work was nearly up to the first floor, the walls were six or seven feet high around both houses; the brick-work was commenced about the 6th or 8th of July. Perkins had the brick-work nearly completed when he abandoned the job. There were bricks furnished by Mr. Smith—about ten thousand; by Mr. Plant twenty thousand. I went to Mr. Brown's office and inquired of Mr. Butler, Brown's clerk or book-keeper, how many bricks were furnished C. W. Perkins for the O-street houses, and he and I went over the blotter together, and found each order charged up to C. W. Perkins on the date when they were ordered. I don't know personally about the number of bricks furnished by Plant and Smith; they told me they had furnished that number. On the eighth day of June, 1871, Mr. Perkins and I went to Williamsport, Pennsylvania, for the purpose of my trying to trade a house and lot there for lumber. While there I met Mr. Deitrick, and he said that he had a lot on K street which he would trade for it. I told him that I would look at his lot and see if it would suit me. Perkins then spoke up and said he thought he could trade
40 the lot for material here. I told him that when he had signed the agreement and gave me security on his bond that he could trade the lot for material with that proviso. I made the trade for the lot about the 16th or 18th of June, and received a deed from Mr. Deitrick dated June 23. I had not seen Mr. Brown at that time. The arrangement between Perkins and me, as was well understood, was, that Mr. Hollidge was to transfer the deed of trust to lot 36 when the house on that lot was fully completed. My contract did not call upon me to give Mr. Perkins a deed for that lot until he had completed the houses. Mr. Hollidge came to me and said that Perkins had been after him to release the lot, and he had told him that he would not do so until the house on lot 36 was completed, as was agreed upon between us. Mr. Perkins told me that he had sold his house on Eighth street to Mr. Havener, by which he was to raise money. He never intimated to me that he desired to raise money on the O-street house until he had abandoned his job.

Ques. Did Perkins ever offer to furnish securities on his contract if you would convey this K-street lot to Brown and remove the mortgage from the house he was building for himself to yours, or give security

that it would be removed upon the completion of your house; and, if so, when?

Ans. He promised a great many times unconditionally to give the security, but failed to do so at any time. After he had abandoned his job, some two or three weeks thereafter, then, as a mere excuse, he offered to give security in case this mortgage was lifted. He never gave me any satisfactory evidence that he could furnish the security, even on those terms. I even inquired of the men whom he named, and they declared that they would not be his security. In reply to him, I stated that I was and had been ready from the beginning to fulfill my part of the written contract, and would have been willing to have deeded the lot to him then, provided he gave the security, although the written contract did not call for it.

Ques. Did you at any time ever order materials from Brown, either in company with Perkins or alone, for these houses?

Ans. No, sir. I never did, nor should I have ordered material for a house that Perkins was building for himself. I went to see Perkins one day to know why he did not go on with the work. He said that the
41 delay was in the furnishing of the bricks; and I went right down with him to Brown's office from Senator Morrill's house, where I went to see Perkins, and he said to Brown that he wished he would hurry up the bricks. And Brown gave him an order for them on Windsor and Ford. I then rode with Perkins in a buggy to Windsor and Ford's, and saw him present his order. This order was given to C. W. Perkins, and not to me, nor did I ask for it. My reason for going there with him was, that he had lied to me so often in regard to these matters, that I went with him to see whether he really did mean what he said he would do.

Ques. Will you state what you know in regard to tickets being furnished for the bricks and materials delivered at the buildings.

Ans. I was there every morning and evening, and saw a great many loads of bricks brought there, but never saw a ticket given for any; and owing to this loose way of doing business, when Mr. Smith delivered his bricks, I had the men make marks on the door-frame, to see whether the full number of bricks actually came. This was for my own satisfaction.

Ques. What promises did you make to Mr. Plant and other materialmen to pay for material furnished to these houses?

Ans. I called at Mr. Plant's office after Perkins had abandoned his job, and inquired of Mr. Plant as to the amount of material that Mr. Perkins had bought of him for those houses. His first reply to me was, that he would not believe that d—d scoundrel under oath, and he then showed me the account in his books. I took a note of the same, and said to Mr. Plant, I suppose I will have to pay this bill, but it will be very hard if I do, for it will be all a dead loss to me. My reason for making this statement was, that I had been informed that the lien law of the District was such that I would be held for these bills if even I held a receipt in full from the contractor. (Objected to.) The party who so informed me told me afterwards, after I had called his attention to the amendment to the lien law of 1870, that he had instructed me wrongly in regard to that. I required securities for the completion of the work in the original contract, because I knew that Perkins was neither reliable nor responsible. It was in the contract at first, being required for my security, the same as I would have done in any
42 other case, although I then believed him to be an honest man. It

was insisted upon afterwards, when I by experience found out that he was not honest.

Cross-examined:

Mr. E. H. Dougherty finished the houses from where Perkins left off, except some little brick-work, which I hired a man to do. He finished the work partly under a written contract, and partly under a verbal contract. As far as the amount of money he was to receive during the progress of the work in cash was concerned, it was in writing. He commenced the work under a verbal agreement, but when I afterwards negotiated a loan from Mr. Warner, then I had a written paper showing the amount of cash he (Dougherty) was to be paid during the progress of the work. I did not call for bids for the finishing of these houses; I went to see Mr. Dougherty and engaged him to do the work in case Perkins fail' to complete at the time required by the contract. Mr. Dougherty was one of the original bidders. I think I paid Mr. Dougherty some $5,500 in all to complete the houses. A memorandum of all the original bids, I think, is in the hands of Mr. Stahley who has gone West. He had it on a card about a year ago. The original bids were torn up, I think. I never saw them after leaving the office of Mr. West, the architect. There were five or six bids in all; Perkins was not the lowest bidder; there was only a few dollars between his bid and that of Manly & Obold. I can't say who came next; they were all very nearly the same. Dougherty's was a little above Perkins'. Dougherty said his bid was to include everything. I think there was about $500 difference between them. I think that Perkins' bid on our house was $3,650, and Dougherty's about $3,850. I am not certain now of the amount, and cannot state positively; the amount was something in that neighborhood. There was a difference of $200 or $300 between the bids on Perkins' house and ours. Dougherty bid on all the houses at first. It was an understanding that the house Perkins took was to be taken in part payment at a certain figure. My impression is that Dougherty's bid on the two houses was either $6,600 or $7,700, I think; I am not certain which; I cannot tell which it was, but I think it was $7,700; upon reflection I am satisfied that it was $7,700. When Dougherty undertook to finish the houses he estimated that all the work that had been done to that time,
43 the materials, labor, excavation, &c., was worth about $3,000; this was on both houses. Perkins' original bid, I think, was $3,600; this was on my house. The house which he was building for himself was advanced further than the other towards completion at the time he left off. The roof of the back building in that house was sheathed in, ready for tinning, which was not the case with the other house. In other respects they were both left in the same condition, open and exposed to the weather. The only changes when Dougherty went on with the work, as he told me, was that he had to cut out joists where Perkins had left them wrongly, and to put in joists where Perkins had left openings by mistake. Perkins, at my request, made our house two feet deeper than the plans called for, for which, and all the extra work connected with it, he was to receive $60 in addition to his bid; and he also made his house four feet deeper than the plan called for. In making these changes Perkins did not change his calculations to accord with them; a recess called for in Perkins' contract was left out by Dougherty. I paid Mr. Dougherty somewhere in the neighborhood of $5,500 for completing both houses. Besides the variations in the original contract just mentioned, Mr. Dougherty, when he finished the houses, did some other extra work, as follows: such as turn-out with newel post at the foot of steps,

as I think it is called, and hot water in two rooms. With carpenters in this city it is a habit to undertake to charge for every little thing that is not expressly mentioned in the contract. I did not go to anybody besides Dougherty to bid for the house. I did not call for bids from other responsible men. Dougherty was recommended to me as a responsible man, and I knew that I could rely upon him, and I engaged him so as to save further trouble. I had never had any business with him besides this. I dealt directly with him. The first money paid Dougherty I think was either in November or December. Before I made this first payment to Dougherty we had not paid out any money to speak of on account of these houses. There was nothing due to Perkins until after he had finished the houses. I believe I paid Jos. Collins $300 for brick-work done under Perkins' directions; there was some very little work done (outside of the work Perkins was to do) by Collins. It would not amount to $10, and was included in this $300. There was some money paid for brick; the exact amount I cannot state without my books. I got
44 from one man about six hundred bricks, and Mr. Lemon bought bricks—I do not know how many. I paid him $75 for laying brick walks and copings on the walls, at another time $10, and another sum on another occasion; all this was for work included in the specifications. Of this $5,500 we paid in cash to Mr. Dougherty, and on his account, about $3,700, I think, and $1,850 in notes, $1,200 in quarterly notes of $100 each, secured by a deed of trust; the first $1,200 of these notes bear 8 per cent. interest, the remaining $650 are payable $50 per month, and bear interest at 6 per cent. My wife owns one of these houses. Mr. Sweet owns the other; he bought it from my wife, through me, as her agent, on the 2d of September, 1872; the price was $6,000. That house is on a lot $20\frac{3}{12}$ feet by 135 feet. My wife bought the lots in the first part of 1871; she bought both lots together, paying thirty cents per foot for them. We now live in the house built for us. My book will show about how much I have paid on these houses outside of the amount paid to E. H. Dougherty. I will produce these books at the next meeting. When Mr. Dougherty undertook to finish the houses we agreed to pay him $4,700, but in the end we paid him in the neighborhood of $5,500.

Ques. For what reason did you pay him eight hundred dollars beyond the contract-price?

Ans. He charged $511; I think it was for what he said were extras, and then, as he complained that he had lost money at that, and begged hard for us to help him out, we agreed to give him notes to the amount of $1,850, instead of $1,565, that would be due him upon settlement of the account.

Ques. Have you brought here to-day at my request the book in which you kept your account of expenditures upon these houses?

Ans. I have.

Ques. Have you with me, within an hour, gone over that account carefully, item by item, and eliminated from it a number of items which have no proper relation to the controversy between you and Perkins?

Ans. Yes, we have done so.

Ques. I wish you would state, after striking out these irrelevant items, how much money, according to this account, has been paid by you for work and material in and about those two houses.

Ans. Sixty-one hundred and fifty-nine $\frac{95}{100}$ ($6,159\frac{95}{100}$) dollars.

45 Ques. Of this sum how much was paid to Mr. Dougherty for finishing the houses?

Ans. Five thousand three hundred and five $\frac{03}{100}$ dollars, ($5,305\frac{03}{100}$.)

Ques. And the remainder, $854 92/100, I understand, was paid to various parties, including $300 to Mr. Collins, the bricklayer?

Ans. Yes, sir.

Ques. How much money, according to your account, has been paid by you for bricks to be used in and about the houses in question?

Ans. About a hundred dollars.

Redirect:

The materials had gone up in price very considerably since the making of the first contract with Perkins, at the time the contract with Mr. Dougherty was made to complete the buildings. There is over a thousand dollars of unpaid bills claimed of me by parties with whom Perkins contracted debts for materials and work furnished for these houses. The houses were finished so that we could get into them about the 1st of July, 1872; there was painting to be done after we got in.

Recross:

The parties who have put liens on the houses for work done and materials furnished under contracts with Perkins are Brown, Heimer, and Plant; and Collins and Clabaugh have made a verbal demand on me for the amount of their claims. Davis sued and got judgment for his bill for sand furnished, and we appealed from this decision. His bill was $79. Heimer's bill was about $175 or $180. I think this was for pressed bricks. This lien was filed after Brown's lien. Plant's lien was filed also after Brown's. This was for about $250.

Patrick H. Cooney.

I did witness a building-contract between Mr. Perkins and Mrs. McMurray. I live in McMurray's neighborhood, and Mr. McMurray came to see me one morning, and told me that he wanted me to walk down and witness a contract between Perkins and his (McMurray's)
46 wife, or himself and wife, for building a house. I found Mr. Perkins there, and was introduced to him by Mr. McMurray. He (Perkins) and Mrs. McMurray signed the contract, and I witnessed it. It was in warm weather. I did not attach much importance to the matter, and did not tax my memory with the day or date. It was early in the morning, probably before 8 o'clock. It was before I left home for office, and I usually leave home about 8 o'clock. I had often before this been talked to by McMurray about his house, and he often complained that Perkins would not sign the contract. I believe I did witness the copy of this contract, afterwards, I think.

Samuel Shelley.

I did work for Mr. C. W. Perkins on a house he was building for Mrs. McMurray, on O street, between 4th and 5th streets, in the year 1871. I did not keep any account of the lumber delivered at those houses. I know of nobody else who did keep that account. I never saw any tickets given to any parties for delivering materials there. I only remained there long enough to put on the first-floor joists. I was not there constantly. I may have stayed there a week; I do not remember exactly. I am a carpenter by trade.

Charles T. Smith.

I am a carpenter. I was employed by Mr. C. W. Perkins upon Mr. or Mrs. McMurray's buildings, on O street, between 4th and 5th streets.

I was at the houses all the ti ne until Perkins stopped work. I was engaged on the carpenters' work. I did not give any tickets for brick delivered there. Mr. McMurray said he did not believe that all the brick ordered came, and at his request I kept an account of some of the brick delivered there. This was not done at Perkins' request, but at Mr. McMurray's. I do not know of any account being kept by any one at Perkins' request of the material delivered at those houses. I do not know of anybody giving tickets for materials delivered there.

Dr. Edwin Grant.

I am at present employed in the Treasury Department. On the
47 16th August, 1871, I went into Brown's office with Mr. McMurray to recite a verbal agreement between Mr. McMurray and myself before Mr. Brown as a witness. The agreement was that, under certain contingencies mentioned, I would buy Mr. McMurray's lot on K street, west of Connecticut avenue, for 50 cents per foot, the next day, terms cash. There was a reservation on both Mr. McMurray's and my part until then, leaving us free until then. Mr. McMurray's object in waiting until next day, as he claimed, was to give Perkins one day more in which to give security on his contract. (Objected to.) After I finished a verbal statement of that agreement, with Mr. Brown as witness, I heard a conversation between Mr. Brown and Mr. McMurray. It commenced by Mr. McMurray's saying that he was unwilling to pay Mr. Perkins any more money on his contract for building houses unless Mr. Perkins kept his promise and gave good security for the fulfillment of his contract. Mr. McMurray also said that he had not then given up hope of Mr. Perkins being able to give the security, and was willing to give him another day in which to do it. Mr. Brown said he expected pay for the brick he had furnished, but he did not say who he expected to pay him, or who he had sold the brick to. I remarked that if Mr. Perkins expected to live in Washington and do business here any length of time he would find it necessary to deal honorably with his fellowmen and live up to his contracts. During this conversation I stood with my back to the door and facing Mr. Brown, and only saw Mr. Brown and Mr. McMurray in the room, to the best of my recollection. It was possible, however, for some one to be standing in the doorway behind me, and I not see him. Mr. Brown made no claim on Mr. McMurray, nor did he name any one else, nor did he say who owed him the money. Mr. Brown did not dissent from Mr. McMurray's claim for security. Mr. McMurray said nothing at all to Mr. Brown about paying to him Perkins' indebtedness; but, on the contrary, he declined to pay Perkins any money without security. Both Mr. Brown and Mr. McMurray seemed to think that Perkins might procure the necessary security by the next day.

Cross-examined:

I have known Mr. McMurray since the year 1867. Mr. McMurray selected Mr. Brown as the witness to our bargain. I did not do it.
48 We happened to meet near Brown's office, and went there. I fix the date as given, because it was the anniversary of my wedding-day, and I was getting my wife a present. I have stated all that occurred at that interview. I have carefully considered my testimony, and it is correctly given. What impressed it upon my mind was that I could not get the lot unless Mr. Perkins failed to give the security. I did not buy this lot, because at the same time I was negotiating for another

house and lot, which I afterward purchased. Mr. McMurray and I did have a conversation in relation to this matter. He came to my desk in the department and asked me a number of questions, to all of which, except one, I answered. I did not know that one related to the giving of security by Perkins. The conversation referred to took place about noon. I never saw Perkins to know him.

Edward H. Dougherty.

I am a carpenter. I was employed by Mr. McMurray to finish the houses commenced by Mr. Perkins. When I took hold, the front or main building had the vertical portion of the French roof partially sheathed in, and the back building of the adjoining house was sheathed in. The outside brick-work was all completed, except the topping-out of the chimneys; that was done afterwards. With the exception of the roof of the back building of one house, the roofs were not ready for tinning. There was no flooring down, and none there that I saw. Looking at Exhibit A. P. B. No. 4, I would say that some of the lumber mentioned therein was not there; for instance the flooring. Without making any calculation, I should not think that so much white pine as that mentioned in the 4th, 5th, and 6th items in this bill could have been used in the window-frames in the houses. That kind of lumber is usually worked into window-frames. There was no lumber of that kind except in the window-frames. The price of metals, tin, and plumbing-work had gone up considerably between the date when I first bid on the houses and the date when I took hold to complete the buildings. My estimate in the first instance for the four houses was $15,600.00. I had a good deal of trouble in regulating the joists, partitions, &c., as I found them when I begun work, and the well-holes for stairs were not framed. Some builders do not attend to this until the house is roofed in. One chimney was out of plumb, and some partitions
49 also, and I had to regulate them.

(Testimony regarding defective work objected to, as not within the issues of the case.)

Cross-examined:

I am a carpenter and builder. I have been engaged in building houses since 1864. Mr. McMurray came to me and asked me to make an estimate of the cost of completing the buildings as Perkins left them. I was to finish them according to the original plans; there was no material alteration. I know that there was, since you mentioned it, a difference in the depth of the back buildings of the houses from the measurement given in the original plan. I cannot remember what was the price for which I agreed to finish the buildings. I made a memorandum, and think I have it now at home. After completing the houses Mr. McMurray paid me, I think, about $511.00 for extra work. I will not be positive about the exact amount. I do not remember exactly how much he paid me in all. I did not furnish any brick for these houses. Without measuring, I should say that there were between 80,000 and 90,000 brick in the two houses. When I began work there was scantling and scaffold-poles around the building; such lumber as builders generally use for scaffolding. I do not wish to be understood as denying that any of the items in the bill (A. P. B. No. 4) are for material that entered into the buildings, except the items for flooring, which amount to $21.96. That lumber was not there. I never saw it there.

Henry H. Bishop.

I am a fire-alarm operator. I signed my name to the paper you show me, Exhibit A. P. B. No. 5, as a witness. I understood it to be a copy of an agreement between Mr. Perkins and Mr. McMurray. I think it was in June, 1871. I won't be positive about the date. I went with Mr. McMurray to Mr. Perkins' house to witness the signatures to the original agreement; this was after the signing of the copy which I have referred to. I think it was in June, soon after I witnessed the signing of the copy which you have shown me. I knew of the house to which the agreement related; it was on O street. The brick-work was started, and I think they were putting in the joists at the time the contract was signed.

50 Ques. State if you ever heard conversations between McMurray and Perkins about Perkins giving security for the performance of his contract. (Objected to as incompetent.)

Ans. Yes, sir. It was either in June, July, or August, the precise date I cannot fix; but the distinct understanding between them was that Mr. Perkins was to give security, and in fact he named a Mr. Hoyle and Mr. Hewitt as the security he would give. I once heard a conversation between Perkins and McMurray, in relation to a lot on K street. (Objected to as incompetent.) It was in regard to trading the lot. Mr. McMurray, as I understood it, was willing to trade the lot with Mr. Perkins for materials. Mr. Perkins said he had not money enough to go on, and the lot was to be used by Mr. Perkins to get material.

Ques. Was the giving of security on the contract to be a condition to his right to trade that lot for materials?

(Objected to as a leading question. Withdrawn.)

Ques. On what terms was Perkins to be allowed to trade the lot for materials?

Ans. By giving security. This was shortly, perhaps two or three weeks, after Mr. McMurray and Mr. Perkins returned from Williamsport. I cannot state the date exactly.

Cross-examined:

I am not related to Mr. McMurray. I have not had any business relations with him. I have known him for about six years. I resided near him at that time.

Ques. You have stated your understanding of the conversation between McMurray and Perkins in reference to the K-street lot; will you be good enough to tell us how many such conversations you overheard, and what was said?

Ans. I heard conversations of that kind as often as twice, perhaps oftener. The conversation that took place was that McMurray wanted Perkins to sign the bond. Mr. Perkins promised to do so a number of times, but kept putting him off, on one excuse or another; that is about all I remember of the conversations. McMurray often took me along with him to Mr. Perkins, wanting me to be a witness to what was said, as he said he believed Perkins was trying to gouge him.

Ques. And that is all you remember, if I understand you, of the conversation between McMurray and Perkins as to the K-street lot?

51 Ans. I cannot state now word for word all that was said at conversations which occurred two or three years ago, but that is not all I remember as to what was said. That is all that recurs to me at this moment. I was often around the building after my office hours. If leading questions were put to me, I could state what was said at those

conversations. Mr. McMurray was trying for some time to find out who Mr. Perkins was trading with, and to whom he intended to trade the K-street lot; and it was some time before he found out. I hardly think there was any other person present at the time [of] that conversation with Mr. Perkins, at Perkins' own house. McMurray at that time went to see Mr. Perkins for the express purpose, I think, of telling him that he must not trade that K-street lot. It was an understood thing that Mr. McMurray was to convey the lot adjoining the house he was building to Mr. Perkins: it was in the contract.

Re-direct:

Ques. What did you understand was the nature of the security Mr. Perkins was to give?

Ans. I understood that he was to put two good men as security on the bond.

Hearing ordered.—Jan'y 30, 1873.

In the supreme court of the District of Columbia.

A. P. BROWN
vs.
SARAH MCMURRAY ET AL. } 2742. Equity.

The clerk will put this cause on calendar for hearing at February term, Jan'y 30, 1873.

E. L. STANTON,
Solr. for Complainant.

Set for hearing, and placed on February, 1873, calendar, as directed.

By the clerk.

52 *Decree filed April* 15, 1873.

In the supreme court of the District of Columbia.

AUSTIN P. BROWN
vs.
SARAH MCMURRAY ET AL. } 2742. Equity.

This cause came on to be heard upon the pleadings, proofs, and proceedings heretofore had, and was argued by the solicitors of the respective parties, and thereupon it is, this 15th day of April, 1873, adjudged, ordered, and decreed that the defendant, Sarah McMurray, is indebted unto the complainant in the sum of twelve hundred and thirty dollars and sixty-two cents ($1,230\frac{62}{100}$) with interest from the first day of August, 1871, and that the complainant recover his demand thereof against said defendant; and that the real estate in the proceedings mentioned, to wit: Lots numbered thirty-six (36) and thirty-seven in square numbered five hundred and eleven, (511,) in the city of
53 Washington, in the District aforesaid, as the same are described on the ground plan of said city, together with all the buildings and improvements thereon, be, and hereby are, subjected to the satisfaction of complainant's said demand; and it is further adjudged, ordered, and decreed that the complainant may have execution against said premises, and may have execution against defendant as at law for the satisfaction of said demand.

By the court.

A. WYLIE.

Appeal to gen. term.—Filed 19 *Ap'l*, 1873.

In the supreme court of the District of Col'a.

BROWN *vs.* McMURRAY. } 2742. Equity dock. 12.

The defendant prays an appeal from the decree passed at special term.
April 19, 1873.

W. S. COX,
Sol'r for Deft.

Appeal entered as per precipe of defendant's solicitor.
By the clerk.

54 *Appeal-bond.—Filed Ap'l* 19, 1873.

Supreme court of the District of Columbia.

BROWN *vs.* McMURRAY. } 2742. Equity dock. 11.

The defendant having appealed to the general term from the decree pronounced against her at special term, on the 15th day of April, 1873, and Edwin J. Sweet, her surety, for themselves and each of them, their and each of their heirs, executors, and administrators, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its decree, which they agree may be pronounced against them all.

SARAH McMURRAY.
EDWIN J. SWEET.

Approved April 19, 1873.

D. C. HUMPHREYS,
Justice.

55 MONDAY, *April* 21, 1873.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the third Monday, 21st day of April, 1873. Present, Justices Olin, Wylie, Humphreys, and MacArthur.

SATURDAY, *June 7th*, 1873.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

AUSTIN P. BROWN *vs.* SARAH McMURRAY ET AL. } 2742. Equity docket 11.

This cause having been argued by counsel on both sides, and submitted to the court on a former day of this term, it is upon consideration
thereof ordered, adjudged, and decreed that the decree of the special
56 term, from which the appeal to this court was prosecuted, be, and the same is hereby, in all things affirmed, with costs.

And from this decree the defendants, by their solicitor, pray an appeal to the Supreme Court of the United States, and it is allowed.

By order of the court.

Appeal-bond.—Filed June 17, 1873.

In the supreme court of the District of Columbia.

AUSTIN P. BROWN
vs.
SARAH MCMURRAY ET AL. } No. 2742. Equity doc. 11.

Know all men by these presents that we, Sarah McMurray, and Edwin J. Sweet, and Amos M. Wilson, and Mayse, and P. H. Heller, of the District of Columbia, are bound unto the above-named Austin P. Brown in the sum of two thousand five hundred dollars, lawful money of the United States, to be paid to the said Austin P. Brown, his
57 executors, or administrators; to which payment, well and truly be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents. Sealed with our seals and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named Sarah McMurray hath appealed to the Supreme Court of the United States to reverse the judgment or decree rendered in the above suit by the supreme court of the District of Columbia,

Now, therefore, the condition of the above obligation is this: that if the above-named Sarah McMurray shall prosecute her said appeal to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SARAH MCMURRAY. [SEAL.]
E. J. SWEET. [SEAL.]
AMOS M. WILSON. [SEAL.]
WM. MAYSE. [SEAL.]
P. H. HELLER. [SEAL.]

Signed sealed and delivered in the presence of
R. A. MCMURRAY.

Approved.
A. WYLIE.

58 DISTRICT OF COLUMBIA, *to wit:*

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages of partly-printed and partly-written matter is truly copied from the originals on file and of record in the clerk's office of said court, and that said originals together constitute the entire record in *in* an equity cause pending in and lately decided by said court, entitled Austin P. Brown vs. Sarah McMurray et al. No. 2742. Equity docket 11.

In witness whereof I have hereunto affixed my hand and the seal of said court this 11th day of October, A. D. 1873.

[SEAL.] R. J. MEIGS,
Clerk.

(Indorsement on cover:) No. 271. Sarah McMurray, Isaac S. Hollidge, trustee, and William H. Hollidge, appellants, vs. Austin P. Brown. District of Columbia, sup. court. Filed 17th October, 1873.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 271.

SARAH McMURRAY ET AL., APPELLANTS,

vs.

AUSTIN P. BROWN.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANTS.

THE CASE.

This is an appeal from the Supreme Court of the District of Columbia, in a suit instituted by the appellee to subject to sale certain property of the appellant, Sarah McMurray, to satify a claim for material furnished by the appellee upon an alleged verbal agreement between him and the husband of the said Sarah McMurray, as her agent, for which the appellee had filed a notice of his intention to hold a lien thereon under the provisions of an act of Congress entitled "An act for the enforcement of Mechanic's Liens on Buildings, and so forth, in the District of Columbia," approved February 2, 1859.

The plaintiff sets forth, in his complaint, in substance, that at divers times in the months of June and July, 1870, he delivered in front of the premises known as No. , O street, in Washington city, D. C., lumber and brick to be

used in the construction of two or more dwelling houses, then being built upon lots 36 and 37 in square 511, which houses and lots were owned by the appellant, McMurray, that said materials were worth $1,230.62, at the ruling prices at that time, and that they were used in the construction of said houses, which at the time of the filing of the bill, were not completed.

That Mrs. McMurray was represented throughout the transactions, by her husband, Robert A. McMurray, who acted as her agent in superintending the construction of said houses. That the materials were furnished upon a verbal agreement between the plaintiff and the said Robert A. McMurray, as the agent of his wife, and that he agreed that upon the delivery of said materials, his wife would convey to the plaintiff a certain lot on K street, in said city, which was owned by the defendant, Mrs. McMurray, or her said husband. That the plaintiff agreed to take said last-mentioned lot in payment for said materials, at the rate of forty-five cents per foot, and, for the excess, the plaintiff was to deliver additional material when called for. That the materials delivered as aforesaid were furnished by the plaintiff solely upon the faith of the agreement between himself and the husband of Mrs. McMurray, as agent aforesaid, and with the distinct understanding that he was to look to Mrs. McMurray for pay therefor. That after delivering said material, Mrs. McMurray refused to convey said lot on K street, as agreed upon, and tried to persuade the plaintiff to take it at the rate of sixty-five cents per foot, which he declined to do. That, subsequently, Mrs. McMurray, through her agent, desired the plaintiff to take cash in payment, which he agreed to do, but that no part of the sum due the plaintiff, as aforesaid, has been paid.

That on the 13th of February, 1872, the plaintiff filed in the office of the clerk of the Supreme Court of the District of Columbia, written notice of his intention to hold a

lien upon said lots 36 and 37, and the improvements thereon.

The plaintiff prayed that said lots, with the improvements thereon, or so much thereof as may be necessary, be sold, and that from the proceeds thereof, his claim be paid, and for general relief.

The answer of the defendant, Sarah McMurray, to the bill of complaint, having been lost or misled, it was stipulated and agreed by the solicitors for the respective parties that the answer of said defendant admitted all the averments of the first, second, fourth, and seventh paragraphs of the bill to be true, and denied each and every other material allegation contained therein.

Upon the hearing of the cause upon the pleadings and proofs, the court below decreed that the defendant, Sarah McMurray, was indebted unto the plaintiff in the sum of $1,230.62, with interest from August 1, 1871, and subjected both of said lots to the satisfaction of the plaintiff's demand, and that he have execution against the same.

The court below erred in passing said decree, because, as is claimed by counsel for the appellant, the same was against both the evidence and the law of the case.

POINTS.

I.

First, as to the evidence. To entitle the plaintiff to the relief he seeks, he must bring himself clearly within the provisions of the act of February 2, 1859. He must satisfy the court beyond a doubt that a contract was entered into between him and Mrs. McMurray, or her agent, to furnish the material to be used in the construction of these two houses; that the same was so used; and that at the time of furnishing it, she was the owner of both buildings.

In this, it is insisted he has wholly failed.

The contract.—Mrs. McMurray entered into a contract in writing with the witness, Charles W. Perkins, whereby he agreed to build a house for her, on lot No. 36, in square 511, he furnishing all the material and labor necessary to complete it in a workmanlike manner, on or before November 1, 1871, for which Mrs. McMurray was to pay him the sum of $3,450 in the following manner, to wit: $1,000, and lot 37, (which joined said lot 36,) to be paid, and the lot deeded to Perkins when the house was finished, the balance, amounting to $1,200, to be paid by notes of $50 each, bearing date December 1, 1871, payable monthly, with interest at eight per cent. per annum, to be secured by a deed of trust on the property. See Ex. A, P. B., No. 5, Rec. 16.

Under this contract Perkins commenced, but failed to complete, this house for Mrs. McMurray; by its terms he was to build one house for her and furnish all the materials and labor.

The agreement attempted to be established by the plaintiff, is a verbal one, alleged to have been entered into between him and Mrs. McMurray's husband, as her agent. In her answer to the bill of complaints, Mrs. McMurray denies having entered into any contract with the plaintiff to furnish her with this material. Her husband testifies, (Rec., 18,) that the work had been progressing on the house about six weeks, the brick work then being nearly up to the first floor, before he ascertained from whom it was that Perkins was getting brick and materials; Mr. McMurray further testifies, (Rec. 21,) in reply to the question: "Did you at any time ever order materials from Brown, either in company with Perkins or alone, for these houses?" "No sir; I never did." That Perkins always tried to keep him from knowing with whom he was trading; that the brick work was nearly up to the first floor, that the walls were six or seven feet high before he met Brown; that as

soon as he knew that Perkins was trading with Brown, he went to Brown's office, and asked him if he was trading with Mr. Perkins for material for these houses, and that Brown answered that he was, that Perkins had traded him a lot which he (Perkins) said he owned on K street, (Rec., 18 and 19); that he examined Brown's "blotter," and found each order charged up to C. W. Perkins. (Record, 20).

Brown himself testifies, (Rec., 3,) that "*about June* 1871, *I made arrangements with Mr. C. W. Perkins to furnish materials for a block of houses to be built by Robert A. McMurray for which he* (*Perkins*) *was to pay me, by giving me a deed of a lot of ground on K street,*" that "the materials were delivered to Mr. C. W. Perkins, and some to Mr. Joseph Collins, the bricklayer, and to a Mr. Smith also." (Record, 4).

The materials furnished were charged by Brown to Perkins, (see Exhibit A. P. B., No. 6, Rec., 18). The bills made out against Brown by the parties who furnished him the material, show that it was on his order in favor of Perkins, and that the material was delivered to the latter. (Exhibits A. P. B., Nos. 1, 2, 3 Rec., 15).

Plant testified, (Rec. 6,) that he knew Perkins; that he furnished him with bricks to go into the houses on O street belonging to Mrs. McMurray, in the summer of 1871; that they were furnished under a contract with Mr. Perkins; that he had not been paid therefor, and that he did not proceed against Perkins to recover the amount due because he did not consider him responsible.

Myers, a clerk for Plant says, (Rec. 4,) that Plant furnished brick to go into the houses upon the order of Perkins and looked to Perkins at that time for his pay.

From this testimony, and that of Perkins, particularly on pages 8 and 14 of the record, it clearly appears, that the plaintiff furnished the material for these houses, under

an agreement between him and Perkins who was the contractor to build Mrs. McMurray's house, and the owner of the other.

The only undertaking on the part of Mrs. McMurray was that if Perkins furnished security on his bond, as the contract contemplated, he could have the K street lot and trade it to Brown for material, at a sum not less than fifty cents per foot.

Who was the owner of these two buildings for which, Brown furnished material? Mrs. McMurray's contract with Perkins was to build one house, for which, as part payment, she was to convey the adjoining lot when Perkins completed her house. On this lot Perkins commenced to build a house for himself while building Mrs. McMurray's. (Rec., 10, 11, 12, 19, 20). Mrs. McMurray never had anything to do with the house Perkins commenced for himself until she dispossessed him on the 1st of November, 1871, the date when Perkins was, by the terms of his written contract, to have her house completed. (Record, 20).

The material furnished by Brown for the house commenced by Perkins for himself, had all been delivered before Mrs. McMurray assumed control over or took possession of it. When Brown delivered this material, Perkins was the equitable owner of lot 37, and the absolute owner of the building it was furnished for. One-half went into Mrs. McMurray's house and the other into the one Perkins was building for himself.

In the face of this fact, the court below decided that Brown had a valid lien against both houses and the lots they were built on.

II.

As to the law.—It is insisted as matter of law, that the plaintiff, upon his own showing, is not entitled to the relief

he seeks, for the contract upon which he relies is a special one.

The bill alleges that the materials were furnished upon a verbal contract whereby Mrs. McMurray's husband, as her agent, agreed that upon the delivery thereof by the plaintiff, she would convey to him a certain lot on K street, owned by her, that the plaintiff agreed to take said lot in payment for said material at the rate of forty-five cents per foot; and for the excess he was to deliver additional material when called for; and that the materials delivered were furnished solely upon the faith of this agreement.

The plaintiff testifies, that upon the strength of the promise of Mrs. McMurray to deed the K street lot to him, he delivered the material for these houses; that after the materials were delivered he demanded the deed of said lot; that he required a conveyance of this lot to him, because he was not satisfied with Perkins, responsibility; that if Mrs. McMurray had not "guaranteed" to deed him this lot, he would have stopped the delivery of the material; and that if Mrs. McMurray had not agreed to deed him the lot, he would not have furnished any material. (Record, 4, 5).

" Where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and cannot resort to the remedy which the mechanics' lien law provides."

Haley *vs.* Prosser, 8 Watts & Serg., 133.

Strong *vs.* Grant, 18 Wal., 623.

The plaintiff must have been entitled to file his lien when the contract was made. He can do nothing afterwards to alter his position.

Hoatz *vs.* Patterson, 5 Watts & Serg., 537.

He clearly had no right to file his lien when the alleged agreement was made; for, by its terms, Mrs. McMurray was to convey a certain lot in exchange for the material

furnished; and upon the strength of her agreement to convey alone, the plaintiff testifies, he furnished the same. His action for a breach of the contract is by a different proceeding. He has a remedy at law; no standing here.

JAS. S. EDWARDS,
For Appellants.

Supreme Court United States.

SARAH McMURRAY
vs.
AUSTIN P. BROWN.

No. ~~871~~ 59

BRIEF AND ARGUMENT FOR APPELLEE.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

SARAH McMURRAY
vs.
AUSTIN P. BROWN.
No. ~~271~~ 59

Brief and Argument for Appellee.

STATEMENT OF CASE.

This is a suit brought in the Supreme Court of the District of Columbia to enforce a lien for materials furnished for houses erected on lots 36 and 37 in square 511 in the city of Washington.

Section 1 of the act of Congress approved February 2, 1859, 11th Statutes at Large, 376, provides: "That any person who shall hereafter, by virtue of any contract with the owner of any building, or with the agent of such owner, perform any labor upon, or furnish any materials, engine, or machinery for the construction or repairing of such building, shall, upon filing the notice prescribed in section 2 of this act, have a lien upon such building and the lot of ground upon which the same is situated for such labor done, or materials, engine, or machine furnished, when the amount shall exceed twenty dollars."

Under section 10 of the act of Congress approved February 22, 1867, 14th Statutes at Large, 404, such lien must be enforced by a bill in equity, and the decree, besides subjecting the property to the lien, may adjudge that the plaintiff recover his demand against the defendant and have execution thereof as at law.

There is raised no question as to the regularity of the proceedings in this case under these congressional enactments. The cause was first heard before Mr. Justice Wylie, holding an equity term of said court, and a decree was passed granting the relief sought by complainant. Upon appeal this decree was affirmed by the Supreme Court of the District in general term. Thereupon an appeal was taken to this court.

The lots were owned by Sarah McMurray, one of the defendants below and appellants here. The two other appellants were made parties because to one of them, Isaac S. Hollidge, there had, before the inception of the complainants' lien, been executed a deed of trust from Sarah McMurray to secure a debt due to the third defendant, William H. Hollidge. Practically, however, Isaac S. Hollidge and William H. Hollidge are out of the case, and Sarah McMurray is the sole defendant; for it is admitted by stipulation filed in the cause, that the deed of trust has been released and the indebtedness secured by it discharged. The transactions in question occurred between Brown, the complainant, and Robert A. McMurray, the husband and admitted agent of Sarah McMurray. His acts have the same effect as though they had been performed by Sarah McMurray.

The single disputed fact in the case is whether the materials were furnished under any contract between Brown and McMurray. Before any communication between the two men just named, there seems to have been an understanding between McMurray and one Perkins, a carpenter and builder, that the latter should have charge of the construction of two houses on lots 36 and 37 respectively, and the latter property was to be taken or used in paying for the house on lot 36. Perkins was without means, possessing no capital except his skill as a builder, and McMurray himself, while he controlled the real estate standing in his wife's name, seems to have been without ready money. The contract, signed by Perkins and McMurray and his wife, bears date June 6, 1871, and according to its terms Perkins was to furnish all materials and labor. But in point of fact

the contract was not signed until later. (McMurray, p. 19.) At the outset, and all through the business, it was well understood by everybody that Perkins had neither money nor credit to obtain such materials, and McMurray was either unable or indisposed to pay for them except by trading other real estate. Before the execution of the contract and on June 8, 1871, Perkins and McMurray went to Williamsport, Pennsylvania, for the purpose of ascertaining whether McMurray could trade a house and lot which he owned in that city for lumber to be used in the proposed buildings. It is evident that Perkins accompanied McMurray as his agent and adviser, and to give him the benefit of his judgment in the trade for lumber. The barter of real estate for lumber was to be made by McMurray, who owned the house. At Williamsport they met one Dietrick, who said he had a lot on K street, in Washington, which he would trade with McMurray for the latter's Williamsport property, and would give his notes to McMurray for the excess in value of the latter property. When this proposition was presented, Perkins said that he thought he could effect in Washington an exchange of the K street lot for materials. McMurray said he would not trade unless the K street lot could be disposed of in trade for materials at the rate of 40 cents per foot. The only inducement to him for the exchange of Williamsport real estate for Washington real estate was the utilization of the latter in procuring material for the new houses. McMurray and Perkins returned to Washington. The next day Perkins met Brown, complainant below and appellee here, and the latter offered to give brick and lumber for the lot, computing the value of the latter at the rate of 45 cents per foot. Within two hours after his conversation with Brown, Perkins reported to McMurray, and told him to have the deed made directly to Brown, proposing at the same time to divide between McMurray and himself the additional five per cent., at which Brown was willing to take the lot above the 40 cents, for which McMurray was willing that it should be traded. McMurray at once approved of the arrangement with Brown, and agreed that the prop-

erty should be conveyed directly to the latter. (McMurray, p. 20; Perkins, pp. 8, 9, 10.) McMurray was thus enabled indirectly to carry out his original design of using his Williamsport property in procuring material for his house, and agreed to close with Dietrick, from whom he received a deed for the K street property June 23d. (McMurray, p. 20.) He was enabled to use both lot 37 and the Williamsport house in building a house on lot 36. Soon after the conversation between Perkins and Brown, and the ratification by McMurray, in his interviews with Perkins, of the proposed arrangement with Brown, McMurray also communicated to Brown his acceptance of the latter's proposition. The day before McMurray came to him Brown had delivered some of the materials (necessarily very little) on the premises. Thus far he ventured on the strength of Perkins being the authorized agent of McMurray. But he would have stopped furnishing materials if McMurray had not come to him and personally ratified the agreement. Brown relied upon his contract made directly with McMurray because the lot was controlled by the latter; and because he was not willing to treat with Perkins alone lest McMurray should repudiate the arrangement. (Brown, pp. 3, 4, 5, and 6.) McMurray informed Perkins that he had seen Brown, and had told the latter that "it would be all right as soon as he could get returns from Williamsport." (Perkins, p. 9.) Afterwards, at another interview between McMurray and Brown, at which Perkins was present, McMurray told Brown that as soon as the materials were furnished he would convey the property to the latter. (Perkins, p. 13.) While the materials were being delivered "McMurray came into Brown's office several times and hurried up the materials to be sent to the buildings." (Wolf, p. 7.) He was on the premises every morning and evening watching the progress of the building and vigilant in securing the delivery of all the brick ordered. He was solicitous and suspicious in attending to the procurement of all the material. In order to see that the full amount came he had an account kept, and he also "had the men make marks on

the door-frame to see whether the full number of bricks actually came," and thus to record the deliveries, (Smith, p. 25; McMurray, p. 21.) In other ways, also, McMurray showed that he considered the materials as being furnished to himself, and admitted his liability for them. Some brick were furnished by one Plant, to whose office McMurray went and inquired the amount of the bills, stating that Perkins "seemed to be dilatory, and that he expected to complete the buildings himself, and would settle the bills." (Plant, p. 6; Myers, p. 6.) Collins did all the brick-work on the houses on lots 36, 37, and McMurray paid him in part, and as to the rest promised him and put him off from time to time, so that it was too late for Collins to avail himself of the lien law. So, also, McMurray paid the lime bill of one Clabaugh. (Collins, p. 14.)

McMurray had prevailed upon Brown to wait for conveyance of the lot until all the material had been furnished. Before Brown had delivered them all McMurray received an offer of 60 cents for the K street lot, and thereupon, with characteristic regard for his own interests, he concluded not to carry out his agreement with Brown, who was to take the lot at 45 cents per foot. Brown had depended on receiving conveyance of the lot, and had made arrangements to sell it, but instead of it he reluctantly consented to take money for the materials. (Perkins, pp. 9–13; Brown, pp. 4–5.) Afterwards, however, McMurray refused to pay him. In the progress of the work difficulties arose between Perkins and McMurray, owing principally to the latter's refusal to carry out the agreement with Brown, and perhaps, also, to dissatisfaction on the part of McMurray with the progress made by Perkins. Finally, in August, Perkins stopped work, and the two houses were finished under the supervision of McMurray by one Dougherty. When Perkins stopped and Dougherty began, materials of the value of $3,000 had gone into the houses, of which all the lumber and most of the brick had been furnished by Brown. (Perkins, pp. 8, 13, and McMurray, p. 22.) But McMurray's first payment on the buildings was made to Dough-

erty. He had previously paid out hardly any money on account of these houses. He admits that, altogether, he has paid for the brick which went into the two houses no more than $100. (McMurray, p. 24; Collins, p. 26; Dougherty, p. 26.) Brown furnished all the lumber from cellar to garret, and for it McMurray has paid nothing whatever. (Perkins, p. 8.) After their completion McMurray sold one house and lot for $6,000, and at the time of his testimony he was residing in the other. (McMurray, p. 23.) He managed the building of his two houses with considerable ingenuity and pecuniary advantage to himself. The whole amount he expended on both houses was.....$6,159.95
He sold one house and lot for.....$6,000
At price fixed by Perkins' contract the lot, exclusive of the building, was worth... 1,250
Making the price obtained for the building, exclusive of the land..... 4,750.00

$1,409.95

From this sum deduct difference between value of K street lot at 45 cents per foot (at which Brown was to take it) and 60 cents, (at which McMurray sold it,)..... 507.00

So that the real net cost of the house in which McMurray resides is..... 902.95
Its value over and above the lot it stands on is....$4,750.00

The foregoing is submitted as a complete and fair statement of the facts in the case.

The statement contained in the brief filed for appellant, in so far as it endeavors to controvert the making of a contract between Brown and McMurray, rests only, first, upon certain unsupported allegations by McMurray, not meriting credence in opposition to the testimony of others and the natural deductions from undisputed facts in the case; secondly, an imperfect quotation, on p. 5 of appellant's brief, from Brown's testimony, (Record, p. 3,) consisting of two sentences excerpted from different parts of the deposition, the

context of which (see Record, pp. 3, 4, 5) demonstrates the incorrectness of the inferences sought to be drawn from that incomplete citation; thirdly, an exhibit in the record, the contents and explanation of which are inconsistent with the use sought to be made of it, for the exhibit is not an account nor an entry against Perkins, (against whom a bill was never presented, and to whom Brown never looked for payment,) but merely a memorandum, the nature of which is explained by Perkins in Record, p. 13, conformably to the usage of dealers in building materials; fourthly, a portion of the testimony of Plant and Myers, not referring at all to material furnished by Brown, although this inference might be incorrectly drawn from the language of appellant's brief; and, fifthly, a conclusion of law sought to be drawn by counsel for appellant that Mrs. McMurray was not the owner of one of the lots in question—a deduction drawn solely from a provision in a contract signed by McMurray and Perkins, to the effect that lot 37, being one of the two adjoining lots, should be conveyed to Perkins on the completion of the house on lot 36 and in part payment of the same.

It is clear that little if any reference was had in the construction of the two houses to the instrument signed by Perkins and McMurray, but the work proceeded under indefinite oral arrangements. (See testimony of Perkins, p. 10, and McMurray, p. 22.) The existence of the contract was unknown to Brown, who furnished, under his agreement with McMurray and without discrimination, material for both houses. The vigilant supervision of McMurray extended to both houses, the conveyance to Perkins was never made, and there is little indication that it was ever designed, and McMurray promptly sold to another at a profit lot 37 and the house built on it out of Brown's material. Thus the considerations presented in the brief for appellant hardly avail to raise a doubt upon the question of fact in the case. Certainly there is reasonable evidence to be found in the record in support of the findings of the two courts by whom the cause was heard and decided before reaching this forum. Under such circumstances this court has more than once re-

fused to disturb a decision on a question of fact in which both courts below had concurred. (The ship Marcellus, 1 Black, 414; Walsh *v.* Rogers, 13 How., 284; The Grace Girdler, 7 Wallace, 204; The S. B. Wheeler, 20 Wall., 385.)

Points on the Questions of Law.

1. The act of Congress (11 Stats. at Large, 376) provides that any person who, "by virtue of *any* contract" with the owner of a building or the agent of such owner, performs any labor done or furnished any material for the construction or repairing of such building, shall by certain procedure have a lien upon the building and the lot of ground upon which the same is situated. It is submitted that the facts show such a contract in this case. But in the brief for appellant it was insisted "that the plaintiff, upon his own showing, is not entitled to the relief he seeks, for the contract upon which he relies is a *special* one." In support of this proposition the brief cites the cases of Halley *v.* Brosser, 8 Watts & Serg., 133; Hotes *v.* Patterson, 5 Watts & Serg., 537, and Grant *v.* Strong, 18 Wall., 623.

The two former decisions "were a surprise to the profession, acted almost as a nullification of the law, and were followed by an act of the Legislature extending the lien to all cases of contracts." (See Phillips on Mech. Liens, p. 166, citing Lay *v.* Millette, 1 Phila., 513; Russell *v.* Bell, 44 Penn., 47.)

These decisions, in 5 and 8 Watts & Serg., rested upon provisions of the lien law in force in Pennsylvania, the object of which, as thus judicially construed, was held to be "to secure those who furnish labor or materials to a mere builder without knowing the owner." The latter of the two cases was decided in 1844, and in the next year the Legislature amended the law so that it should "extend to and embrace claims for labor and materials in erecting any building erected under or in pursuance of any contract or agreement for the erection of the same." (See Russell *v.* Bell, 44 Penn., 47.)

2. The case of Grant *v.* Strong, 18 Wall., 623, in no manner supports the proposition maintained in the brief for appellant, that when a special contract has been made the materialmen or laborers have no lien. The decision of the court in the case just cited was based upon the acceptance by the builder of "another and very different *security* for the payment for his work, inconsistent with the idea of a mechanic's lien." Consequently, the court held that no such lien attached. In the case at bar the complainant below never had any security whatever. There was nothing more than an oral promise to convey him a lot of land in payment for his materials.

3. The complainant below, having no other security, was not deprived of his lien by reason of agreeing to accept land instead of money for his materials. There is no distinction in principle between an agreement to pay money or property which can possibly affect the remedy provided. (Phillips on Mech. Liens, 182; Campbell & Kennedy *v.* Scaife *et al.*, 1 Phila., 187; Haviland *v.* Pratt, 1 Phila., 364; Hinchman *v.* Lybrand, 14 Serg. & Rawle, (Penn.,) 32; Reiley *v.* Ward, 4 Iowa, (Greene,) 21.)

EDWIN L. STANTON,
Of Counsel for Appellee.